

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
AT&T Corp.)	
)	
Petition for Rulemaking to Reform)	RM No. 10593
Regulation of Incumbent Local Exchange)	
Carrier Rates for Interstate Special)	
Access Services)	
)	

**REPLY COMMENTS OF
PAC-WEST TELECOMM, INC. AND US LEC CORP.**

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Dated : January 23, 2003

Table of Contents

Page No.

INTRODUCTION AND SUMMARY.....	1
I. BOCS ARE DODGING THE RATE-OF-RETURN ISSUES RAISED BY AT&T BY BLAMING THE ARMIS AND SEPARATIONS RULES INSTEAD OF BY PROVIDING REFUTING DATA.....	3
II. BOCS HAVE NOT PROVEN THAT SPECIAL ACCESS SERVICES IS COMPETITIVE.....	5
III. SPECIAL ACCESS DEREGULATION WAS AN EXPERIMENT, BUT IT HAS FAILED MISERABLY	9
CONCLUSION	12

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Pac-West Telecomm, Inc. ("Pac-West") and US LEC Corp. ("US LEC") (sometimes referred to collectively as "Joint Commenters"), by their undersigned counsel and pursuant to section 1.405 of the Federal Communications Commission's ("FCC's" or "Commission's") Rules, 47 C.F.R. § 1.405, respectfully submit the following Reply Comments pursuant to the Commission's Public Notice, released on December 9, 2002, regarding the above-captioned proceeding.¹

INTRODUCTION AND SUMMARY

In its Petition, AT&T provided the FCC with striking data from the Bell Operating Companies ("BOCs") ARMIS reports that demonstrates that the BOCs have a continued stronghold on the special access market with as much as 55% rates-of-return on these services.

¹ *Wireline Competition Bureau Extends Deadline for Filing Reply Comments to Comments on AT&T's Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM 10593, Public Notice, DA 03-3393 (rel. Dec. 9, 2002).

Faced with this extraordinary evidence, though, the BOCs interestingly do not provide directly refuting evidence to the FCC, but instead give lengthy criticisms of the validity of the ARMIS and separations rules.

The FCC cannot allow the BOCs to continue to dodge the pricing flexibility issues raised by AT&T, particularly with the detailed record in this proceeding of BOC market power abuses for special access services, including price increases. Price increases, as the Commission well knows, are not the actions of a participant in a competitive market. Rather, they are the typical actions of a dominant provider in a market lacking competitive alternatives.

While the FCC may have believed in 1999 that collocation triggers would be able to accurately measure competition in a particular special access service market, that assumption has proven incorrect in the dramatically different market environment that has emerged since that time. No longer can the FCC assume that collocation facilities of competitive providers will be taken over by new entrants and that competition will result. Instead, these triggers have allowed the highest level of pricing flexibility relief to be granted in over half the Metropolitan Statistical Areas (“MSAs”) across the nation, resulting in only increased special access prices being imposed by the BOCs on competitive providers with no alternatives available.

Joint Commenters agree with the majority of commenters in this proceeding that the FCC cannot ignore the mounds of compelling evidence that has been presented regarding the BOC market power abuses in the provision of special access services, particularly when the BOCs have failed to directly address this data. Moreover, the FCC has a duty to reexamine the pricing flexibility regime that it instituted in 1999 in order to correct these BOC market power abuses and, thus, should immediately grant AT&T’s request for the initiation of special access pricing flexibility rulemaking proceeding.

I. BOCs ARE DODGING THE RATE-OF-RETURN ISSUES RAISED BY AT&T BY BLAMING THE ARMIS AND SEPARATIONS RULES INSTEAD OF BY PROVIDING REFUTING DATA

In its Petition, AT&T provided extensive rate-of-return data on the BOCs' special access services based upon the information provided in the BOCs' ARMIS reports that they are required to file with the FCC.² Instead of directly addressing these rate-of-return issues by providing refuting special access cost/revenue information, the BOCs have instead chosen to complain that the FCC's ARMIS and separations rules do not provide an accurate measurement of the BOCs' costs and revenues associated with special access services³ and that the ARMIS data included in AT&T's Petition pre-dates the implementation of special access pricing flexibility relief.⁴

Interestingly, even the BOCs' economists, whose declaration is primarily focused on criticisms of the ARMIS and separations rules, fail to provide any corresponding cost/revenue data that would demonstrate that the BOCs rates for special access services are just and reasonable. The omission of cost/revenue information in the BOC economists' declaration is particularly striking given that the BOC economists describe in detail their understanding of the costs and revenues associated with AT&T's long distance services.⁵ The inclusion of such irrelevant cost/revenue data on another provider begs the question of why they did not provide

² *AT&T Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, Tab A, Friedlander Declaration & Tab B, Ordoover and Willig Declaration (filed Oct. 15, 2002) ("AT&T Petition").

³ *Opposition of SBC Communications, Inc.*, RM No. 10593, at 19-23 (filed Dec. 2, 2003) ("SBC Comments"); *Comments of BellSouth Corporation* at 4-9 (filed Dec. 2, 2003) ("BellSouth Comments"); *Opposition of Qwest Communications International Inc.*, RM No. 10593, at 8-13 (filed Dec. 2, 2003) ("Qwest Comments"); *Opposition of Verizon*, RM No. 10593, at 21-23 (filed Dec. 2, 2003) ("Verizon Comments"); see also Declaration of Alfred E. Kahn and William E. Taylor On Behalf of BellSouth Corporation, Qwest Corporation, SBC Communications, Inc. and Verizon, dated Nov. 27, 2002, at 7-9 ("BOC Economists Declaration")

⁴ *SBC Comments* at 18-19; *BellSouth Comments* at 12-13; *Qwest Comments* at 5; see also *BOC Economists Declaration* at 17-20.

⁵ *BOC Economists Declaration* at 10-11.

relevant BOC special access data for their own clients to refute the rate-of-return data provided by AT&T, and is indicative of a purposeful attempt to avoid directly the special access rate-of-return issues raised by AT&T.

The BOCs criticisms of the accuracy of the resulting data from ARMIS and separations rules are particularly puzzling given that the BOCs rely on the ARMIS data at times in order to counter arguments raised by AT&T, such as to show the amount of special access lines and the number of trouble reports for special access.⁶ The BOC criticisms of the ARMIS and separation rules thus appear disingenuous in light of their reliance on such data within the same document.

Furthermore, the BOCs criticism of the rate-of-return data provided by AT&T as predating implementation of pricing flexibility relief is not valid based on the data provided by their own economists. The MSA pricing flexibility chart included in the BOC economists' declaration shows that only Qwest may be in a position to make any timing argument because it received pricing flexibility for the first time in 2002.⁷ In contrast, SBC, Verizon and BellSouth all received a majority of their current pricing flexibility relief in late 2000 and early 2001.⁸ Specifically, according to the BOC economists pricing flexibility chart, as of November 2002, SBC had received 71% of its pricing flexibility relief by early 2001 (63 MSAs), Verizon had received 100% of its pricing flexibility relief by early 2001 (97 MSAs) and BellSouth had received 85% of its pricing flexibility relief by late 2000 (76 MSAs).⁹

⁶ *Id.* at 15-16.

⁷ *Id.* at 19.

⁸ *Id.*

⁹ *Id.*

If the market for special access services was as competitive as the BOCs describe, and if pricing flexibility triggers were a true indicator of whether the market for special access services was competitive, the BOCs would not be able to continue reaping exorbitant rates-of-return, or increasing prices with respect to those services, after widespread pricing flexibility relief had been granted in early 2001. Instead, the BOC rate-of-return data provided by AT&T,¹⁰ as well as the competitive providers' own experiences¹¹ demonstrate that the BOCs have continued these market power tactics even after pricing flexibility relief has been granted.

Moreover, Joint Commenters agree with the vast majority of commenters that, faced with the striking BOC special access rate-of-return data derived from publicly-available, mandatory BOC ARMIS reports, the FCC has a duty to initiate a rulemaking to investigate the issues raised in AT&T's Petition, particularly when the BOCs have not provided any other cost/revenue information to counter the data included in their ARMIS reports.

II. BOCS HAVE NOT PROVEN THAT SPECIAL ACCESS SERVICES IS COMPETITIVE

The BOCs claim that the pricing flexibility triggers are working because the market for special access services is "competitive."¹² These claims, however, do not comport with the experiences of the numerous competitive providers who submitted comments, nor with the Commission's own data on the industry.

¹⁰ *AT&T Petition*, Tab A, Friedlander Declaration, Exhibit 1.

¹¹ *See Comments of Ad Hoc Telecommunications Users Committee*, RM No. 10593, at 3 (filed Dec. 2, 2002); *Comments of Cable & Wireless USA, Inc.*, RM No. 10593, at 6-7 (filed Dec. 2, 2002) ("*Cable & Wireless Comments*"); *Comments of PaeTec Communications, Inc.*, RM No. 10593, at 2 (filed Dec. 2, 2002) ("*PaeTec Comments*"); *Comments of Sprint Corporation*, RM No. 10593, at 6-7 (filed Dec. 2, 2002) ("*Sprint Comments*").

¹² *See BellSouth Comments* at 14-21; *SBC Comments* at 6-15; *Qwest Comments* at 18-24; *Verizon Comments* at 9-17; *see also BOC Economists Declaration* at 25-27.

Many competitive providers have explained how they would prefer to use alternative BOC special access facilities. However, they usually find that there is no alternative facilities-based special access provider for the particular area or areas they intend to serve and, thus, are repeatedly forced to purchase special access services from the BOCs.¹³ One competitive provider even noted that in the limited instances in which alternative special access facilities are available, the rates charged by those facilities-based non-BOC sources are usually far less than the exorbitant rates charged by the BOCs.¹⁴ Joint Commenters reiterate that they have experienced the same conditions in the marketplace and also would welcome the opportunity to use the services of non-BOC facilities-based special access providers, but have rarely found themselves in situations where such opportunities exist.¹⁵

Additionally, many commenters consistently describe that after they are effectively forced to purchase special access services from the BOCs due to a lack of alternative access providers, they are also effectively forced to assent to long-term commitment requirements and harsh termination penalties imposed by the BOCs that prevent them from utilizing any alternative provider facilities should they become available.¹⁶ These long term commitments may be innocuous in a competitive market, but in a market such as special access that is clearly dominated by the BOCs, they only serve to stymie the operational growth of competitors. Again, Joint Commenters submit that they, too, have experienced these abusive “lock-up” practices at

¹³ *Cable & Wireless Comments* at 7, 12-13; *Sprint Comments* at 3-4; *Comments of XO Communications, Inc.*, RM No. 10593, at 5 (filed Dec. 2, 2002) (“*XO Comments*”).

¹⁴ *Cable & Wireless Comments* at 15.

¹⁵ *See Joint Comments of Pac-West Telecomm, Inc. and US LEC Corp.*, RM. No. 10593, at 5 (filed Dec. 2, 2002) (“*Pac-West/US LEC Comments*”).

¹⁶ *Cable & Wireless Comments* at 16; *Comments of LMDI Telecommunications, Inc.*, RM. No. 10593 (filed Dec. 2, 2002; *Sprint Comments* at 5-6; *XO Comments* at 5.

the hands of the BOCs when they have been forced to purchase BOC special access services with no alternative access facilities available, as is typically the case.

Strikingly, the BOCs have admitted to raising prices for special access in areas in which they have been granted pricing flexibility.¹⁷ If the special access market was as competitive as the BOCs describe, and if the pricing flexibility triggers were true indicators of a competitive market, the BOCs would not be able to raise prices for their special access services in those areas in which they have been granted pricing flexibility relief. It is incredulous that the BOCs would attempt to argue that price increases are evidence of competitive market; instead, it is clear that the BOCs admission of special access price increases serves only to further undermine their competitive market claims.

Likewise, the BOC economists criticize descriptions of market power abuses such as increased prices as merely theories about what is happening in the special access market.¹⁸ However, instead of specifically refuting these market power abuses with specific facts such as price comparisons, the economists provide their own theories of why the BOCs presumably would not engage in such anti-competitive behavior.¹⁹ Most notably, their special access fiber charts are conspicuously missing data on the corresponding BOC special access facilities that would form a basis for comparison.²⁰

The only specific data the BOCs have provided to support their claims that the special access market is competitive has been proven inaccurate in other proceedings and also is contrary to the FCC's own information on the special access market. Specifically, the BOCs

¹⁷ *BellSouth Comments* at 11; *Qwest Comments* at 26; *Verizon Comments* at 25.

¹⁸ *BOC Economists Declaration* at 12.

¹⁹ *Id.* at 12-14.

²⁰ *Id.* at 23-24.

incredibly contend that competitive providers have captured as much as 1/3 of the special access market.²¹ The BOCs have made these same claims in the *Use Restriction Proceeding* and in the *Triennial Review Proceeding*, and in both proceedings, those figures were shown to be incorrect²² and, furthermore, are patently unbelievable given the ability of the BOCs to continue to raise special access rates. The BOCs numbers also do not comport with the FCC's data, which places the competitive providers share of the special access market at a mere 11.5%.²³

Furthermore, as various commenters have noted in the *Triennial Review Proceeding*, the BOC statistics as to the presence of fiber-based collocators does nothing to demonstrate that alternative fiber facilities are available.²⁴ Even with the presence of a competitive fiber provider ("CFP") in a central office, competitive providers still encounter much difficulty in getting access to the CFP.²⁵ The BOCs, however, continue to trumpet the presence of a fiber-based collocator as proof of surrogate transport facilities,²⁶ even though they also deny CFPs

²¹ *SBC Comments* at 11; *Verizon Comments* at 12; see also *BOC Economists Declaration* at 3-4.

²² See *Reply Comments of AT&T Corp.*, CC Docket No. 96-98, at 17-19 and Exhibit B, Pfau Declaration, at ¶¶ 5-21 (filed Apr. 30, 2001); *Comments of AT&T Corp.*, CC Docket Nos. 01-338, 96-98 and 98-147, at 153-154 (filed Apr. 5, 2002).

²³ Industry Analysis Division, FCC, *Telecommunications Industry Revenues 2000*, Tables 5 and 6 (Jan. 2002).

²⁴ *Reply Comments of the Association for Local Telecommunications Services, Cbeyond Communications, LLC, DSLnet Communications, LLC, El Paso Networks, LLC, Focal Communications Corporation, New Edge Network, Inc., PaeTec Communications, Inc., Pac-West Telecomm, Inc., RCN Telecom Services, Inc., and US LEC Corp.*, CC Docket Nos. CC Docket Nos. 01-338, 96-98 and 98-147, at 66 (filed July 17, 2002) ("*ALTS, et al. Triennial Review Reply Comments*").

²⁵ *Id.* As these commenters noted, such is the case with SBC who at every turn of the tap put artificial barriers between collocators and alternative providers. They explain how SBC recently arbitrated its obligation to provide cross connects between collocators in the same central office, wanting the collocators to "self provision" cabling between cages by augmenting the collocation arrangement, installing conduit and running cabling. This work takes unnecessary time and money when the cross connect panels exist in the central office already. Joint Commenters agree that this is a typical example of the BOCs stating to the FCC that competitive alternatives exist, but at a grassroots level thwarting competition at every turn.

²⁶ *SBC Comments* at 12; *BellSouth Comments* at 14-15; *Verizon Comments* at 13; see also *Comments of SBC Communications Inc.*, CC Docket Nos. 01-338, 96-98 and 98-147, at 86 (filed Apr. 5, 2002); *Comments of BellSouth Corporation*, CC Docket Nos. 01-338, 96-98 and 98-147, at 91 (filed Apr. 5, 2002); *Comments of Verizon Telephone Companies*, CC Docket Nos. 01-338, 96-98 and 98-147, at 106 (filed Apr. 5, 2002).

reasonable access to the central office.²⁷ The existence of a single “fiber-based collocator” in those central offices does nothing to show the availability of that fiber to other competitive providers or of other alternatives in the remaining BOC central offices. For some competitive providers, the BOC is the only source of these loop and transport facilities in the markets in which they operate.²⁸ Further, even in the rare instances where competitive providers have access to another collocated competitive provider’s spare fiber, it often takes the BOC months to make the connection necessary for the provider to use such alternative fiber.²⁹

Moreover, given the BOCs admitted ability to continue to increase special access rates and engage in exclusionary “lock-in” tactics, the BOCs blatantly failed to prove that the market for special access services is competitive as the widespread grant of pricing flexibility relief would indicate. Instead, such anti-competitive behaviors are strong evidence of market power abuses, that are only further substantiated by the fact that the BOCs continue to hold 88.5% of market share in the provision of special access services even though the Commission took steps to open that market to new entrants more than 20 years ago.

III. SPECIAL ACCESS DEREGULATION WAS AN EXPERIMENT, BUT IT HAS FAILED MISERABLY

When the FCC decided to establish the special access pricing flexibility rules in 1999, it was hopeful that the collocation triggers it created would be an accurate indicator of whether special access services in a particular area were competitive so as to warrant deregulation of

²⁷ *Petition for Declaratory Ruling of Coalition of Competitive Fiber Providers*, CC Docket No. 01-77, filed March 15, 2001 (“*Fiber Coalition Petition*”).

²⁸ *Comments of LDMI Telecommunications, Inc.*, RM No. 10593, at 7 (filed Dec. 2, 2002) (“*LDMI Comments*”); *PaeTec Comments* at 5; *Comments of Time Warner Telecom*, RM No. 10593, at 14 (filed Dec. 2, 2002); *XO Comments* at 5; see also *ALTS, et al. Triennial Review Reply Comments* at 66-67.

²⁹ *ALTS, et al. Triennial Review Reply Comments* at 67.

those services. As WorldCom has pointed out, the FCC admittedly pinned these hopes on only a limited record before it in 1999.³⁰

Unfortunately, three years of experience in the marketplace has shown that the FCC's deregulation experiment for special access services has failed. Instead of following the FCC's intention that pricing flexibility relief would be granted in only limited circumstances where the market for special access services are competitive, the pricing flexibility triggers have resulted in the BOCs being granted Phase II pricing flexibility for over half the MSAs in the country, including, as WorldCom noted, in such small cities such as Dubuque, Iowa and Owensboro, Kentucky.³¹ Surely special access competition cannot exist in over half the country when competitive providers only hold 11.5% of the nation-wide market share for such services.

The BOCs attempt to justify the widespread pricing flexibility relief granted to them by merely repeating the FCC's hopes from 1999 that satisfaction of the triggers would be demonstrative of a competitive market.³² As the vast majority of commenters have pointed out, the FCC's hopes with respect to competitive accurateness of its collocation triggers has proven to be incorrect.³³ In a competitive market, BOCs would not be able to increase special access prices and competitive providers would not feel locked into paying the high special access rates or succumbing to long term commitments imposed by the BOCs as they do.

In 1999, as the BOCs admit, the FCC believed that collocation by competitive providers would be a "powerful deterrent" to anticompetitive behavior by the BOCs because, once

³⁰ *WorldCom Comments* at 11 (citing to *Access Charge Reform*, Fifth Report and Order and Notice of Proposed Rulemaking, 14 FCC Rcd. 14221, at ¶ 96 (1999) ("*Pricing Flexibility Order*").

³¹ *Id.* at 7-8.

³² *SBC Comments* at 5-10; *Qwest Comments* at 2, 13-14; *Verizon Comments* at 6-9;

installed, the facilities could be taken over by another competitive provider if the competitive provider who installed the facilities left the market.³⁴ While this market assumption may have been reasonable in 1999, when new competitive providers were emerging every day and investment was freely flowing to the telecommunications industry, this assumption, unfortunately, has proven to be incorrect due to the enormous market changes that have occurred over the past three years. Since 1999, numerous competitive providers that had installed collocation facilities have, in fact, left the market. However, in a industry where investment has dramatically decreased, it is no longer reasonable to assume that another competitive provider will take over these abandoned facilities. Instead of collocation facilities of competitive providers being an indicator of competition, such facilities merely mean that a competitor at one point installed such facilities – nothing more, nothing less. In fact, given the current market, it likely would be more reasonable to assume that such facilities have not been taken over by another competitive provider.

Moreover, Joint Commenters note how the state of the special access market demonstrates BOC dominance in transport facilities. The BOCs' control of the market and their ability to charge excessive, above-cost prices demonstrate their dominance. After obtaining pricing flexibility for special access services in certain areas, the BOCs have, by their own admission, increased their special access rates.³⁵ Additionally, striking evidence not directly

³³ See, e.g., *Comments of the American Petroleum Institute*, RM No. 10593, at 3 (filed Dec. 2, 2002); *Cable & Wireless Comments* at 1-2; *LDMI Comments* at 3-4; *Pac-West/US LEC Comments* at 5; *PaeTec Comments* at 3-4; *Sprint Comments* at 2-5; *WorldCom Comments* at 4-5.

³⁴ *BOC Economists Declaration* at 5-6.

³⁵ *BellSouth Comments* at 11; *Qwest Comments* at 26; *Verizon Comments* at 25.

refuted by the BOCs has been presented by AT&T that demonstrate BOC special access rates are now nearly twice the economic costs.³⁶

Joint Commenters, like the majority of commenters in this proceeding, strongly urge the FCC to immediately revisit its pricing flexibility rules as three years of implementation in the marketplace is a sufficient amount of time to assess the ineffectiveness of the collocation triggers, particularly given dramatic changes in the telecommunications industry that have occurred during that time, as acknowledged by the BOCs. These changes have meant that the assumptions upon which the pricing flexibility collocation triggers were based are no longer valid and, thus, do not effectively assess competition in the special access market that would warrant BOC pricing flexibility relief.

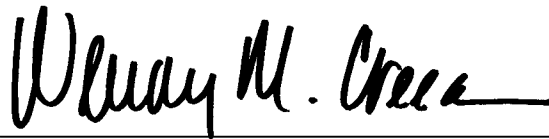
CONCLUSION

For the reasons stated in their Comments and in these Reply Comments, Joint Commenters strongly support the initiation of a rulemaking proceeding to reexamine, reform and tighten the rate regulation of BOCs special access services. Joint Commenters also agree with AT&T and many other commenters that the Commission should adopt interim measures, pending completion of the rulemaking proceeding, including the reduction of all special access

³⁶ *AT&T Petition*, Tab B, Ordoover and Willig Declaration at 9-12.

charges for services subject to Phase II pricing flexibility, without penalties to customers, to rates that would produce an 11.25% rate of return, as well as the establishment of a moratorium on consideration of further pricing flexibility applications.

Respectfully submitted,

A handwritten signature in black ink, reading "Wendy M. Creeden". The signature is fluid and cursive, with a horizontal line extending from the end of the name.

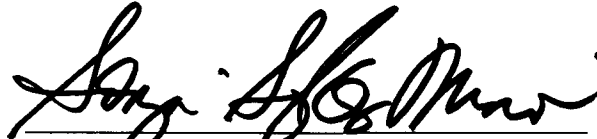
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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of January 2003, copies of the foregoing **Reply Comments of Pac-West Telecomm, Inc. and US LEC Corp.; RM-10593**, were sent via Electronic Mail or First Class Mail (where indicated) to the parties on the attached service list.



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